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Message Text

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JUSTICE: B. RISTAU
DESIRED DISTRIBUTION
JUSTICE: B. A. RISTAU; USIA: E. HIDALGO
---------- 004142
O 271545Z NOV 74
FM SECSTATE WASHDC
TO AMEMBASSY QUITO IMMEDIATE

C O N F I D E N T I A L STATE 261625

E.O. 11652:DECLAS (6/30/75)
TAGS: EC, AMGT
SUBJECT:CLAIMS RESULTING FROM CLOSING OF QUITO
BINATIONAL CENTER

REFTEL: A) QUITO 7922; B) STATE 258819

1. SUMMARY: LAWYERS OF JUSTICE, USIA, AND DEPARTMENT MET AGAIN ON NOV. 25 AND CONCLUDED THAT USG SHOULD NOT WAIVE DIPLOMATIC IMMUNITY OF USG OFFICIALS NAMED IN SUBJECT CASE; HOWEVER, DEPT REQUESTS EMBASSY'S OPINION ON RAMIFICATIONS OF SUCH A DECISION. SPECIFICALLY, DEPT REQUESTS AMONG OTHER THINGS INFORMATION CONCERNING MEMBERS OF BOARD OF DIRECTORS OF BNC WHO DO NOT HAVE DIPLOMATIC IMMUNITY.

2. AT NOV. 25 MEETING, HIDALGO OF USIA SPOKE FOR ONE HOUR WITH BUSTAMANTE BY TELEPHONE CONCERNING BUSTAMANTE'S CONFIDENTIAL

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OPINION OF OCTOBER 16, 1974. ON BASIS OF THESE COMMUNICATIONS, DEPT UNDERSTANDS THAT BNC WAS PROPERLY FORMED INDEPENDENT LEGAL ENTITY, THAT PAO BELL WAS A MEMBER OF BOARD OF BNC, AND THAT FALCONI WAS BNC'S ACTING

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PRESIDENT OF THE BOARD OF THE BNC. FURTHER, DEPT IS
INFORMED THAT FALCONI ENTERED INTO THREE YEAR UNION
CONTRACT WITH PETITIONING FORMER EMPLOYEES; THAT UNDER
ARTICLE 35 OF THE ECUADORIAN LABOR CODE LIABILITY FOR THE
CLAIM IN QUESTION IS PRIMARILY THAT OF THE INDEPENDENT
LEGAL ENTITY BNC BUT THAT, ALONG WITH LIABILITY OF BNC,
LIABILITY MAY ALSO ATTACH TO THE MANAGERS, ADMINISTRATORS,
AND MEMBERS OF THE BOARD WHOSE ADMINISTRATIVE FUNCTIONS AR
SUFFICIENTLY POSITIVE TO IMPLY MANAGERIAL DIRECTION OF THE
BNC; THAT THE BNC WAS IN THE OPINION OF BUSTAMANTE
CLOSED IMPROPERLY IN THAT NOTICE OF CLOSURE WAS NOT
GIVEN TO EACH EMPLOYEE IN ADVANCE; AND THAT IN A
ECUADORIAN TRIAL ON THE MERITS THE PETITIONERS WOULD
LIKELY BE ENTITLED TO AN INDEMNITY OF 50 PERCENT OF THE
SALARIES WHICH THEY WOULD HAVE EARNED UNDER THE MENTIONED
THREE YEAR CONTRACT AND WHICH IS ESTIMATED TO BE
APPROXIMATELY 50,000 DOLLARS. BUSTAMANTE DOES NOT HAVE
INFORMATION CONCERNING THE PRESENT ASSETS OF THE BNC,
BUT HE DOUBTS THAT THERE IS ANY RESIDUE LEFT.
BUSTAMANTE ADVISES THAT ANY OF THE ABOVE MENTIONED
MEMBERS OF THE BOARD COULD BE HELD LIABLE IF TEIR
DIPLOMATIC IMMUNITY HAD BEEN WAIVED FOR THE ENTIRE
CLAIM IN WHICH EVENT CLAIMS COULD BE MADE BY THE ONE
HELD LIABLE AGAINST OTHER MEMBERS OF THE BOARD FOR THEIR
PRO RATA SHARE OF THE LIABILITY. IN THAT AMBASSADOR
BREWSTER'S ROLE WAS EXTREMELY SHORT LIVED AND LIMITED,
BUSTAMANTE BELIEVES THAT NO RESPONSIBILITY WOULD ATTACH
TO AMBASSADOR BREWSTER IN SUCH A CASE UNDER ARTICLE 35
OF THE LABOR LAW. HOWEVER, IN THAT BELL WAS AN ACTIVE
MEMBER OF THE BOARD, THE SITUATION OF BELL IS FACTUALLY
DIFFERENT, AND IT IS DIFFICULT TO PREDICT IN SUCH A
CASE WHAT AN ECUARDORIAN LABOR COURT MIGHT RULE WITH
RESPECT TO THE APPLICATION IN THIS CASE OF ARTICLE 35.
THE POTENTIAL LIABILITY OF EDRIS AND STEVENS WOULD
DEPEND ON A PROOF OF THE DEGREE OF THEIR ACTIVITY IN
THE BNC; THE DEPT LACKS FACTS TO MAKE AN ASSESSMENT
OF THEIR LIABILITY.
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3. BUSTAMANTE INFORMED THE DEPT THAT THE ECUADORIAN
SUPREME COURT IS IN THE PROCESS OF PREPARING A FINAL
OPINION REGARDING THAT COURT'S JURISDICTION OVER
AMBASSADOR BREWSTER, BELL, EDRIS, AND STEVENS IN VIEW
OF THEIR DIPLOMATIC IMMUNITY. BUSTAMANTE ADVISES
THAT IF THE DIPLOMATIC DEFENDANTS ABSTAIN FROM ANY
ACTION WHATSOEVER WITH RESPECT TO THESE PENDING CLAIMS
BEFORE THE SUPREME COURT, THE ECUADORIAN SUPREME COURT
WILL LIKELY RULE IN THE NEAR FUTURE THAT THE NAMED
FOUR ENJOY DIPLOMATIC IMMUNITY AND HENCE THE ECUADORIAN
SUPREME COURT DOES NOT HAVE JURISDICTION WHICH WOULD
RESULT IN THE DISMISSAL OF THE SUIT AS TO THESE FOUR.
IN SUCH AN EVENT, THE PETITIONERS COULD PROCEED IN

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THE LOCAL LABOR COURTS AGAINST FALCONI, OTHER MEMBERS OF THE BOARD OF DIRECTORS OF THE BNC WHO LACK DIPLOMATIC

IMMUNITY, AND OTHER PERSONS, IF ANY, CHARGED WITH ADMINISTRATIVE RESPONSIBILITY FOR THE FUNCTIONING AND CLOSURE OF THE BNC.

4. DEPT REQUESTS EMBASSY'S ADVICE ON PROPOSED RECOMMENDATION THAT EMBASSY RESPOND TO FOREIGN OFFICE NOTES UNDER REFERENCE BY DECLINING TO WAIVE DIPLOMATIC IMMUNITY OF ANY USG INDIVIDUALS. WHEN RESPONDING, DEPT ASKS EMBASSY TO BEAR IN MIND THESE FACTORS. A) USG AS MATTER OF POLICY DOES NOT ASSERT DIPLOMATIC OR SOVEREIGN IMMUNITY AGAINST MERITORIOUS CLAIMS. THIS POLICY IS BASED ON THE OBVIOUS EQUITABLE GROUND THAT USG SHOULD PAY FOR DAMAGE CAUSED TO OTHERS BY FUNCTIONING OF USG IN PROPRIETARY CAPACITY. PROVIDING EDUCATIONAL AND CULTURAL SERVICES TO LOCAL POPULACE IS NORMALLY SUCH A PROPRIETARY, AS OPPOSED TO SOVEREIGN, FUNCTION. B) HOWEVER, BNC IN LEGAL CONTEMPLATION IS DISTINCT FROM USG, AND USG DOES NOT THEREFORE BEAR RESPONSIBILITY FOR BNC'S LEGAL WRONGS SUCH AS IMPROPER CLOSURE OF BNC. FALCONI ENTERED INTO THREE YEAR CONTRACT WHEN PRUDENCE OF SUCH A STEP WAS QUESTIONABLE IN VIEW OF THE DIFFI-CULTIES THAT CONFRONTED THE BNC, CLOSED THE BNC IN AN IMPROPER FASHION EVEN THOUGH HE IS A LAWYER, AND REPORTEDLY HAS RECEIVED FULL PAYMENT FOR HIS SERVICES CONFIDENTIAL

IN POSSIBLE DEROGATION OF FORMER EMPLOYEE'S RIGHTS. PETITIONING FORMER EMPLOYEES SHOULD BRING THEIR CLAIMS AGAINST FALCONI AND OTHERS RESPONSIBLE FOR POSSIBLE IMPROPER APPLICATION OF ASSETS IN LIQUIDATION. C) IF DIPLOMATIC IMMUNITY WERE WAIVED IN THIS CASE FOR ONE OR MORE USG OFFICIALS, THE CASE WOULD BE HEARD IN AN ECUADORIAN LABOR COURT AS OPPOSED TO A COURT OF GENERAL JURISDICTION. AS A MATTER OF POLICY, THE USG DOES NOT VOLUNTEER TO ENTER COURTS OF LIMITED JURISDICTION, SUCH AS LABOR COURTS OF OTHER COUNTRIES, BECAUSE EXPERIENCE TEACHES THAT THE ADMINISTRATION OF JUSTICE IN THOSE COURTS DOES NOT LIVE UP TO THE JUDICIAL STANDARDS OF COURTS OF GENERAL JURISDICTION. D) PAGE 3 OF THE NOVEMBER 30, L973, MINUTES OF THE BNC SUGGESTS THAT THE THREE YEAR CONTRACT MAY BE INVALID IN ANY EVENT. PAGE 3 SPEAKS OF THE ALLEGED ("QUE SE PRETENDE") CONTRACT WHICH WAS CERTAINLY NOT APPROVED BY THE BOARD OF THE BNC. THUS, WE HAVE QUESTIONS AS TO THE ENFORCE-ABILITY AND LEGAL EFFECT OF THE CONTRACT WHICH FALCONI FOR REASONS BEST KNOWN TO HIMSELF SIGNED WHEN THE DIFFICULTIES OF THE BNC WERE AT HAND AND WHEN LIQUIDA-TION WAS EASILY FORESEEABLE. E) A TRIAL ON THE MERITS IN SUCH AN ECUADORIAN LABOR COURT WOULD HAVE A

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DETRIMENTAL EFFECT ON USG RELATIONS WITH THE GOE.

5. THE DEPT HAS CONSIDERED AT SOME LENGTH THE POSSIBILITY OF OFFERING TO SETTLE THIS CLAIM ON THE MERITS WHILE CLAIMING DIPLOMATIC IMMUNITY BEFORE THE ECUADORIAN SUPREME COURT. THERE ARE SEVERAL DIFFICULTIES WITH ATTEMPTING SUCH. A) BECAUSE THE BNC IS A LEGALLY SEPARATE ENTITY, THERE IS AT LEAST A DISTINCT POSSIBILITY THAT THE GAO WOULD REFUSE TO PERMIT USIS OR THE DEPARTMENT TO PAY FOR ANY SUCH SETTLEMENT. THE DEPT CAN EXPLORE THIS POSSIBILITY ON AN INFORMAL BASIS, BUT WISHES TO KNOW EMBASSY'S VIEW OF THE NECESSITY OF ATTEMPTING SUCH A SETTLEMENT. B) UNDER THE GOVERNMENT TO GOVERNMENT CLAIM PROCEDURE WHICH DOES NOT REQUIRE A GAO APPROVAL, THE PETITIONERS WOULD HAVE TO PROVE THAT THEY HAVE EXHAUSTED ALL ADMINISTRATIVE REMEDIES. IN THIS CASE, PETITIONERS WOULD BE REQUIRED TO FIRST BRING A SUIT IN THE US COURT OF CLAIMS. JUSTICE BELIEVES CONFIDENTIAL

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THAT THERE IS AT LEAST A DISTINCT POSSIBILITY THAT SUCH A SUIT IN THE US COURT OF CLAIMS WOULD RESULT IN A JUDGMENT FOR THE PETITIONERS. IN A RECENT CASE BEFORE U.S. DISTRICT COURT IN THE DISTRICT OF COLUMBIA INVOLVING AN EMPLOYEE OF ANOTHER BINATIONAL CENTER; IT WAS HELD THAT THE EMPLOYEE WAS DESERVING OF RETIREMENT BENEFITS AS A USG EMPLOYEE. EVEN THOUGH THE US COURT OF CLAIMS PROVIDES AN EQUITABLE SOLUTION TO THIS PROBLEM, THE EMBASSY SHOULD NOT SUGGEST THAT THE CLAIMANTS PROCEED TO THE COURT OF CLAIMS. IF, HOWEVER, THE PETITIONERS TOOK THEIR CASE TO THE US COURT OF CLAIMS, OVERCOME ANY PROBLEM INVOLVED IN RETAINING A LAWYER FOR SUCH A CASE, AND THEN LOST, APPROVAL OF A GOVERNMENT TO GOVERNMENT CLAIM IS STILL VERY DIFFICULT FROM AN ADMINISTRATIVE AND BUDGETARY POINT OF VIEW.C)THE USG DOES NOT WISH TO PAY $50,000 TO THESE PETITIONERS WHO WILL NOT RENDER ANY SERVICES TO USG. USIS IS AN UNSATISFIED CREDITOR OF BNC WITH CONSIDERABLE CREDITS ON ITS BOOKS TO THE UNDERSTANDING OF THE DEPT. THERE IS A SERIOUS QUESTION THAT SUCH AN AMOUNT COULD BE FOUND IN THIS YEAR'S BUDGET. ASSUMING THAT THE GAO PROBLEM CAN BE OVERCOME, THERE IS STILL THE PROBLEM OF BARGAINING WITH THESE PETITIONERS WHO WILL CLAIM SUCH CONSTITUTES RECOGNITION OF LIABILITY FOR THE WHOLE AMOUNT AND WHO WILL NOT BE PLEASED TO ACCEPT LESS THAN THE FULL AMOUNT.

6. DEPT STILL LACKS INFORMATION ON SEVERAL KEY POINTS. A) PRECISELY WHAT ASSETS DOES THE BNC NOW HAVE? SURELY THE LIQUIDATOR OR OTHER GOVERNMENTAL OFFICIAL HAS A COMPLETE RECORD OF HOW MUCH REMAINS. IF SOME ASSETS REMAIN, WHO CONTROLS THEM? B) WAS FALCONI INSTRUCTED

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TO ENTER INTO THE MENTIONED THREE YEAR CONTRACT? IF NOT, DID THE BOARD OF DIRECTOS OF BNC RATIFY HIS ACTION? EMBASSY IS REQUESTED TO FORWARD ANY BACKGROUND INFORMATION IN THIS REGARD. C) WHAT IS USG RESPONSIBILITY, IF ANY, FOR THE OTHER MEMBERS OF THE BOARD OF DIRECTORS OF THE BNC WHO MAY INDIVIDUALLY BE HELD LIABLE FOR THE ENTIRE DEBT OWING TO THE PETITIONERS? DID THEY HAVE ADMINISTRATIVE FUNCTIONS SUCH THAT UNDER SECTION 35 OF
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THE LABOR LAW THEY WOULD BE DEEMED TO BE JOINTLY RESPONSIBLE WITH THE BNC FOR THESE CLAIMS? DOES THE USG OWE A MORAL OBLIGATION TO THESE MEMBERS? D) IF USG CLAIMS DIPLOMATIC IMMUNITY, WILL THERE BE SUBSTANTIAL DAMAGE TO USG-GOE RELATIONS? IF SO, WHAT REMEDIAL ACTION WOULD BE REQUIRED? ANY INFORMATION EMBASSY CAN OFFER WITH REGARD TO THESE QUESTIONS WOULD BE APPRECIATED.

7. WE SINCERELY REGRET LATE DATE OF THIS TELEGRAM. DEPT'S ABILITY TO ADVISE EMBASSY IOF COURSE HEAVILY DEPENDENT ON BUSTAMANTE'S OPINION. AFTER RECEIVING HIS OCTOBER 16, 1974, OPINION, SEVERAL SUBSTANTIAL QUESTIONS REMAINED REQUIRING FURTHER CONTACT BY TELEPHONE WHICH WAS NOT ACHIEVED UNTIL NOV. 25.

8. BEFORE INSTRUCTING EMBASSY TO DECLINE TO WAIVE DIPLOMATIC IMMUNITY OF FOUR NAMED OFFICERS, DEPT REQUESTS EMBASSY'S ADVICE. INGERSOLL

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